STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois-American Water Company	:	
	:	07-0519
	:	
Application for Certificates of Public Convenience and Necessity to Provide Water Service to Parcels in Peoria County, Illinois, pursuant to Section 8-406 of the Public Utilities Act.	:	

REPLY BRIEF OF THE STAFF OF

THE ILLINOIS COMMERCE COMMISSION

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TABLE OF CONTENTS

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	:	07-0519
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Pursuant to 83 Ill. Adm. Code 200.800, Staff witnesses of the Illinois Commerce Commission ("Staff"), by and through its attorneys, hereby files its Reply Brief responding to the Initial Brief filed by Rural Route 150 Water District (hereafter "RR 150"), in the above-captioned proceeding.

I. INTRODUCTION

Staff's Initial Brief identified and responded to many of the arguments raised in the Initial Brief filed by RR 150. In this Reply Brief, Staff responds only to the extent that RR 150 has raised arguments which Staff did not adequately address in Staff's Initial Brief. Staff continues to rely on its positions and arguments set forth in Staff's Initial Brief and those arguments are incorporated and adopted as if fully set forth herein.

As discussed in Staff's Initial Brief, Staff concurs with Illinois-American Water Company (hereafter "Petitioner", "IAWC", or the "Company") that the proposed construction of the Water Systems is necessary and least cost (see Section 8-406(b)(1)) and that IAWC is capable of managing and supervising the construction of the Water Systems for the Expanded Area (as required by Section 8-406(b)(2)). Staff IB at 3. Staff recommends in favor of a finding that IAWC has demonstrated that it is capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers. Staff Ex. 3.0 at 1-2. Staff therefore continues to recommend that the Commission grant the Certificate of Public Convenience and Necessity (hereafter "CPCN" or "Certificate") to IAWC.

II. ARGUMENT

RR 150 argues that, if IAWC is granted a Certificate to serve customers in the expanded areas, this will result in higher water rates for customers in the remaining portions of the RR 150 service territory. RR 150 Initial Brief (hereafter "RR 150 IB") at 2, 3, 4. It characterizes this proposition as "undisputed". Id. at 4. Relying on the authority of Illinois Power Co. v. Commerce Comm'n, 111 Ill. 2d 505; 490 N.E.2d 1255; 1986 Ill. Lexis 227; 96 Ill. Dec. 50 (1986) (hereafter "IP v. ICC"), RR 150 argues that the Commission can, and should consider the advantages of service provided by other providers, comparative costs to the public if the certificate is granted or denied, and the interests of the public generally. RR 150 IB at 3. It argues that IAWC's request for certification exceeds the area for which it has actual requests for service, that in seeking such certification, IAWC intends to serve those customers that "it can easily and inexpensively serve", thereby undermining the ability of RR 150 to serve all customers,

and would therefore result in the remaining customers – those within RR 150, but outside the Expanded Area – paying higher water rates. Id. at 3-4.

RR 150 notes that IP v. ICC is distinguishable from the instant matter insofar as IP v. ICC does not deal with water service. RR 150 IB at 3. This is correct, but is only one of the many ways in which IP v. ICC is distinguishable from the instant matter. In fact, IP v. ICC is sufficiently distinguishable from the present matter as to be fatal to RR 150's claim.

The Staff agrees generally with RR 150 that IP v. ICC authorizes the Commission to consider "the comparative advantages of service provided by a utility other than the petitioning utility, and the respective costs to customers, when weighing the question of public convenience in a proceeding under the Public Utilities Act." IP v. ICC, 111 Ill. 2d at 512; 490 N.E.2d at 1258; 1986 Ill. Lexis 227 at 8. In the Commission proceeding underlying IP v. ICC, the Commission was called upon to approve or reject the acquisition of Mt. Carmel Public Utility Company (hereafter "Mt. Carmel"), a small utility serving some 5,500 electric and 3,500 natural gas customers. Id. at 508-09; 490 N.E.2d at 1256; 1986 Ill. Lexis 227 at 3-4. The company seeking to acquire Mt. Carmel, Illinois Power Company (hereafter "IP"), served at the time of the proposed acquisition some 522,000 electric and 388,000 natural gas customers. Id. at 508; 490 N.E.2d at 1256; 1986 Ill. Lexis 227 at 3. IP's service territory was, at its closest, approximately 75 miles from Mt. Carmel's. Id. at 514; 490 N.E.2d at 1259; 1986 Ill. Lexis 227 at 12. At the time of the proposed acquisition, IP was constructing the Clinton nuclear power station; during the pendency of the proceeding, construction would fall behind schedule and begin to go over budget, which had the effect of increasing IP's revenue requirement,

and hence its rates, by $75 million over those it projected in its petition. Id. at 515; 490 N.E.2d at 1259; 1986 Ill. Lexis 227 at 13-14.

The objector to the acquisition, Central Illinois Public Service Company (hereafter "CIPS") served at the time some 305,000 electric and 148,000 natural gas customers. Id. at 508; 490 N.E.2d at 1256; 1986 Ill. Lexis 227 at 3. Its service territory was contiguous to Mt. Carmel's on three sides, and it had 52 employees in place within 15 miles of Mt. Carmel. Id. at 514; 490 N.E.2d at 1259; 1986 Ill. Lexis 227 at 12.

The Supreme Court summarized the Commission's findings as follows:

> The Commission found from the evidence that the electric transmission lines of Illinois Power are, at the nearest point, approximately 75 miles from the lines of CIPS; that the Mt. Carmel service area in Illinois is bordered on three sides by the service area of CIPS and that the electric systems of CIPS and Mt. Carmel are integrated; that Illinois Power would establish a district office in the Mt. Carmel service area if the petition were approved but that CIPS already had 52 employees within 15 miles of the Mt. Carmel service area, which would allow for a quicker response to service needs. The Commission made a finding that electric service facility planning would be simpler under CIPS because of its history of integration with Mt. Carmel and its extensive experience in the planning and operation of the Mt. Carmel system.
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> …
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> The Commission made findings favorable to CIPS concerning the interests of the ratepayers, or customers, of Mt. Carmel and the incremental cost of service. Both [IP] and CIPS had submitted comparative analyses of projected rates. Each study formed different conclusions, which the Commission attributed to differences in some of the underlying assumptions used by the two companies in forecasting future revenues. However, the Commission found it significant that the comparison of electric rates made by both utilities included the assumption that [IP's] nuclear generating unit under construction in Clinton, Illinois, would be in service by September 1983. The nuclear generating unit was not, in fact, completed by that time and, subsequent to the close of evidence in hearings before the Commission, Illinois Power announced that the facility in Clinton would not be operable until August 1984, at an increased cost to Illinois Power of $ 351 million. The Commission determined "a cost increase of this magnitude could increase Illinois Power's electric revenue requirement by approximately $ 75 million

> annually over the projections introduced in this case." CIPS, on the other hand, would not have this additional production cost as it was found to be "near completion on the construction of the last generating unit that it plans to build in this decade," and the cost of this last unit was included in the revenue projections submitted by CIPS.
>
> The Commission concluded from this that the electric rates of Illinois Power were likely to be higher than those of CIPS during the period included in its projections. The Commission also found from the evidence that CIPS had lower gas rates than Illinois Power and that it was likely that CIPS would have lower gas rates "in the foreseeable future."
>
> IP v. ICC, at 514-16; 490 N.E.2d at 1259-60; 1986 Ill. Lexis 227 at 12-15.

It is clear, therefore, that the Commission found that (a) CIPS's proximity to the Mt. Carmel service territory, in contrast to IP; and (b) CIPS's relatively lower rates, both militated against IP's proposal. Implicit in this decision, however, was CIPS's ability to actually serve the customers at the time of the acquisition. The Commission was able to conclude from the record before it that CIPS would be able to provide service to all Mt. Carmel customers at lower rates than those that IP would charge.

Here, the situation is markedly different. First of all, RR 150, unlike CIPS, is unable, based on the record in this proceeding to serve any customers at all as of today. It possesses no facilities or employees. Further, since RR 150 has no employees or facilities and provides no service, it cannot authoritatively state that its rates will be lower than IAWC's, as CIPS was able to state, and as the Commission was able to find as a fact. Indeed, the only suggestion that RR 150 can make regarding a comparison of rates is that, if IAWC receives its certificate, those customers within RR 150's territory but outside of IAWC's will pay higher rates in the event that RR150 ever provides service to them or anyone else. (Tr. at 60.) In other words, RR 150 suggests that the Commission deny certification to IAWC based on the assertion that the

unknown and entirely hypothetical rates it might be compelled to charge in the event of IAWC's certification will exceed the unknown and entirely hypothetical rates it would otherwise charge. This is in the Staff's view a slim, bordering on nonexistent, reed to support a finding against IWAC.

Contiguity of service area favors IAWC as well. It is clear that IAWC's service territory is immediately contiguous to the area for which it seeks certification, and that it has employees in the area. There are currently no facilities in place for RR 150 to interconnect, even if interconnection of water facilities made sense. While RR 150's service territory actually subsumes some of the Expanded Area, this is scarcely the basis for a Commission finding in its favor, inasmuch as it has no employees or facilities, in the area or elsewhere. As noted above, the Commission's finding in favor of CIPS in IP v. ICC was based, in part on CIPS having employees and facilities close to Mt. Carmel, and interconnecting directly with Mt. Carmel, as well as being simply closer.

In short, application of the holding in IP v. ICC favors IAWC's Petition. Consideration of "the comparative advantages of service provided by a utility other than the petitioning utility" compels the conclusion that, inasmuch as RR 150 provides no service, there are no "comparative advantages" that the Commission might consider.

RR 150 next assert that certification of IAWC will result in "inadequate or no service" to customers in the portions of the RR150 service territory outside of the IAWC certificated area. RR 150 IB at 4. It argues that such a result would be contrary to the Illinois Appellate Court's ruling in CURED v. Commerce Comm'n, 285 Ill. App. 3d 82; 673 N.E.2d 1159; 1996 Ill. App. Lexis 917; 220 Ill. Dec. 738 (5th Dist. 1996) (hereafter "CURED"). Id.

The general rule regarding certificates of convenience and necessity enunciated by the Appellate Court in *CURED* is as follows:

> A certificate of public convenience and necessity is issued to prevent unnecessary duplication of facilities and to protect the public from inadequate service and higher rates resulting from such duplication, while simultaneously protecting a utility against indiscriminate or ruinous competition. [citation]. What constitutes the public convenience and necessity is within the discretionary powers of the Commission.
>
> CURED, 285 Ill. App. 3d at 89; 673 N.E.2d at 1165; 1996 Ill. App. Lexis 917 at 89

While RR 150 fairly states the rule, it ignores application of the rule to the current dispute, because such application would require rejection of RR 150's claim. There is, based on the record before the Commission, no likelihood of duplication of facilities; indeed, the problem is that the customers in question have no access to any facilities at all. Likewise, there is no question of higher rates resulting from such duplication of facilities. It would, under the circumstances, be difficult to characterize the state of competition within the Expanded Area as either "indiscriminate or ruinous".

RR 150's sole argument here is the one it has reprised throughout the proceeding: that if IAWC receives its certificate, RR 150 might be unable to serve the remainder of the customers in the RR 150 service territory in an economically efficient manner, resulting in such customers having "inadequate or no service". This may well be true. However, as of today, none of the customers in the RR 150 service area – inside or outside of the IAWC Expanded Area – have any service whatever. Denying certification to IAWC will not remedy this problem.

In summary, the Staff must recommend that the Commission not concern itself overmuch with RR 150's assessment of its economic viability, which appears to the

Staff to be an academic and theoretical question in any case. RR 150 does not now, nor has it ever, provided water service to a single customer, and there is no reason based upon the record here for the Commission to assume that it ever will. IAWC, in contrast, proposes to build facilities promptly upon certification, and provide water service to customers who are currently without it. The Staff sees no reason to deny that request.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Staff of the Illinois Commerce Commission respectfully requests that Commission issue a Certificate of Convenience and Necessity as requested to IAWC and adopt Staff's recommendations in its Order in this matter.

Respectfully submitted,

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May 1, 2008

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